identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 22 2010

SRC 07 800 26081

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a research associate. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for the classification sought, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a statement. For the reasons discussed below, we uphold the director's decision.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. from Beijing Medical University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the

Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

We concur with the director that the petitioner works in an area of intrinsic merit, genetic research, and that the proposed benefits of his work, improved understanding of genetic hearing disorders, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

The petitioner has repeatedly asserted that his selection for a research associate position and his medical background demonstrate his superiority to other researchers. Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background."

Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

As of the date of filing, the petitioner had published one article. In response to the director's request for additional evidence, the petitioner submitted evidence of a second published article and minimal citations of his first article. The petitioner must establish his eligibility as of the date of filing. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). On that date, the petitioner had published only a single article. On appeal, the petitioner asserts that his work is at a critical stage and will eventually be suitable for publication in *Nature Genetics* or *Cell* but that he would have to settle for a lesser journal to publish sooner. He states that he relies on the opinions of experts to establish his eligibility.

U.S. Citizenship and Immigration Services (USCIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of the significance and potential impact of the petitioner's results are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner *and* who have applied his work are the most persuasive.

The petitioner has been working at the House Ear Institute in Los Angeles since 2002. All of the letters primarily address his work at this institute. The petitioner's supervisor at the institute, [redacted], discusses the substantial intrinsic merit of the petitioner's work and its national scope, which is not at issue. [redacted] continues that the petitioner's hard work and dedication are resolving many issues in the study of the complex and genetic disease Branchial-Oto-Renal

(BOR) syndrome, which occurs in one out of 40,000 births and accounts for more than two percent of deafness in children. [redacted] notes that the alien employment certification process cannot take into account innate ability. [redacted] then praises the petitioner's educational background and characterizes him as irreplaceable. Regarding the petitioner's specific accomplishments, [redacted] asserts that the petitioner identified a modifier gene in a mouse and was close to identifying a second, which "few researchers" have accomplished. [redacted] asserts that this work was well received when presented, "opened the door" for future work and attracted offers of collaboration. While the petitioner's research clearly has practical applications, it can be argued that any article, in order to be accepted for publication, must be original and offer new and useful information to the pool of knowledge.

[redacted] of Research at the House Ear Institute, asserts that the petitioner's] main project is "cloning genes implicated in the development of BOR." [redacted] explains that, using a modifier approach, the petitioner "has identified the two major genome regions that affect the development of the BOR syndrome." [redacted] notes that this work appeared in *Genomics*, a major genetic journal. We will not presume the influence of an individual article from the journal in which it appeared. It is the petitioner's burden to demonstrate the actual impact of his article in the field. [redacted] further asserts that the petitioner has linked two important molecules, DDEF2 and Eyal1 to a single pathway, a "big breakthrough" that "will have a great impact" on research on inner ear development, signal transduction and gene modification.

acknowledges that this work is not published, but asserts that the recognition in the field of this work is evident from the fact that [redacted] has submitted a grant renewal proposal based on the petitioner's study. The submission of a grant application does not imply that the grant will be awarded. Regardless, even if the grant is awarded, [redacted] citation of his subordinate's study in a grant proposal does not demonstrate that the work is being utilized beyond [redacted] laboratory. Any decision to renew the grant would indicate only that future work at the laboratory is warranted. We note that the vast majority of research, if not all research, is funded by research grants. It does not follow that every researcher whose work is cited on a grant application warrants a waiver of the alien employment certification process in the national interest.

a research associate professor at the House Ear Institute, asserts that the *Eya 1* gene was known to be crucial to the development of the inner ear. explains that the petitioner "used a powerful genetic approach in identifying two genetic loci (named *Mead1* and *Mead2*) that modulate the effect of the *Eya 1* mutation by taking an advantage of the mouse model established in his mentor's laboratory." Thus, it appears that the petitioner did not personally create the mouse model he used. While [redacted] attests to the importance of this work and speculates that it will not "come to fruition" without the petitioner's continued work on the project, he does not explain how the petitioner has already influenced the field beyond [redacted] laboratory.

In a letter submitted in response to the director's request for additional evidence, [redacted] Executive Vice President of Research at the House Ear Institute, asserts that the petitioner has

successfully identified four modifier genes for BOR syndrome, *Eleven, Plekhf2, DDEF2* and *ICAP-1*. According to [redacted], the petitioner has demonstrated that these genes "are likely to play a crucial role in the formation of the main site of hearing, the cochlea." While [redacted] notes that as of the date of his letter, the petitioner had published two articles, he does not provide examples of how these articles have influenced the field.

The petitioner did submit several letters from members of the field who have not collaborated with him. In general, these letters discuss the importance of the petitioner's area of research, provide general praise and make vague claims of contributions rather than provide concrete examples of how the petitioner has already influenced the field beyond [redacted] laboratory. For example, [redacted] of a research group at the Université Joseph Fourier, affirms his belief that the petitioner's work "will have great impact in the field of hearing research as well as the cell adhesion and signaling studies."

[redacted] speculates that the petitioner's work "will have great impact" on BOR syndrome research. More specifically, [redacted] states that the petitioner's work with a particular mouse model offers "a novel approach to study BOR syndrome in humans." First, as stated above, it is not clear that the petitioner personally created the mouse model he is using. Even if he did, the record contains no evidence that independent laboratories are now using this model.

[redacted], a professor at the University of California, Los Angeles who has collaborated with [redacted] asserts that the petitioner's results have made it possible to study many molecular interactions involved in hearing and that the petitioner established a whole set of congenic mouse strains that are an invaluable research tool. Once again, even assuming that the petitioner did create novel mouse strains, the record lacks evidence that these mice are being widely used in the field.

[redacted], an associate professor at the Jackson Laboratory, also asserts that the mutant mouse model used by the petitioner provides a valuable model for human BOR syndrome. [redacted] explains that knowledge about the genes and molecular pathways being studied by the petitioner "will provide insights into BOR pathology and inner ear development." While [redacted] concludes that the significance of the petitioner's contributions is evident from his "oft-cited scientific publications," the record contains no evidence that the petitioner was or is "oft-cited." The record does contain a review article by [redacted] that includes an addendum citing the petitioner's work. [redacted] does not single out the petitioner's work as more significant than other recent research on strain background effects and genetic modifiers of hearing in mice.

[redacted] a professor at Tel Aviv University who has visited the House Ear Institute, asserts that the petitioner has made "remarkable and unique progress in analyzing a mouse model" for BOR syndrome. [redacted] concludes that the petitioner's publications attest to the significance of the petitioner's impact in the field. As of the date of filing, however, the petitioner had only one published article. The record contains a review of mutant models by [redacted] citing the petitioner's article. Specifically, she cites the petitioner's article and another article for the proposition that some groups

have mated mice carrying deafness related mutations with mice from different strains. The article includes several pages of endnotes where the petitioner's work is not singled out as more significant than other research in the area.

The record shows that the petitioner is respected by his colleagues and has made useful contributions in his field of endeavor. Ultimately, however, the petitioner had published only a single article that had yet to garner significant attention as of the date of filing. We acknowledge the letters attesting to the promising nature of the petitioner's project and the significance of his successes on this project. As stated above, the inclusion of the term "prospective" was used to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *NYSDOT*, 22 I&N Dec. at *219.*

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.